

Town of Enfield
Special Town Board Meeting Minutes
Enfield Community Building
Friday, April 12, 2013
6:30 p.m.

Present: Town Supervisor Ann Rider, Town Councilperson Mike Carpenter, Town Councilperson Chris Hern, Town Councilperson Vera Howe-Strait, Town Councilperson Debbie Teeter, Town Clerk Alice Linton.

Supervisor Rider opened the meeting at 6:35 p.m. by leading the assemblage in the Pledge of Allegiance to the Flag.

Supervisor Rider moved, with a second by Councilperson Teeter to authorize the supervisor to pay General Fund voucher #104 dated April 12, 2013 in the amount of \$34,309.87 and H-Fund voucher #119 dated April 12, 2013 in the amount of \$43,955.76.

Discussion: Supervisor Rider asked the record to reflect that this has not been done in a vacuum and she went back through her emails and February 1 she provided the board with answers to questions Councilperson Hern had about the H-Fund which had to do with the chain of events as follows:

From: Ann Rider <daylilyann10@yahoo.com>
To: Chris Hern <chern@hughes.net>; Vera Strait <vstrait18@htva.net>; Debbie Teeter <dlt22@cornell.edu>
Sent: Friday, February 1, 2013 1:23 PM
Subject: H Fund

All-
Chris had some questions about the H Fund at the audit meeting. I have done some research and here is what I have found:

We borrowed money to build the new highway facility.

In our local budget, this was put into a special line called the H fund along with some local money that had been saved over the years for the express purpose of replacing our Town facilities.

The building was built and apparently we spend less than was originally thought and therefore, less than we borrowed so the H Fund line in our local budget contained money.

I understand that the new highway facility is completed. Although the general contractor has not completely signed off, this process is underway because the building is completed as put out to bid.

The bond has to be repaid and since there was a balance in the H Fund, the State Comptroller's office has told us that we must use this money first to repay the bond that we borrowed. It is not legal to raise taxes on the landowners when we have \$ sitting in this account and we can not take this \$ out of this line because it is expressly for the purpose of building a building.

The H Fund has always been listed on the monthly report that the Supervisor has provided to the Town Board.

The bond repayments have come from this fund for the past few year's twice or 3 times yearly by voucher which 3 Board members have to approve and all Board members can see and review prior to voting on the vouchers at monthly meetings.

Apparently there has been some talk about paving the driveway and parking area at the new highway facility but that was not part of the building project. If there is desire to have this done, it will have to be figured into the yearly budget in the upcoming years.

After that email was sent, Roy Barriere wrote an email to the board on February 13 answering further questions that were brought up at the February board meeting:

From: Roy L Barriere <rlb15@cornell.edu>

To: "sevenfolks@aol.com" <sevenfolks@aol.com>; "vstrait18@htva.net" <vstrait18@htva.net>; "daylilyann10@yahoo.com" <daylilyann10@yahoo.com>; Deborah L. Teeter <dlt22@cornell.edu>

Sent: Wednesday, February 13, 2013 9:15 PM

Subject: tonight's meeting

First of all, congratulations Mike, on your appointment to the Board. You were an excellent choice and I'm sure you will serve the Town well.

Secondly – good job Ann. You're fitting right into that position very well.

Lastly, I would like to fill you in on the comments that Buddy brought up on the new highway facility and the sale of some used equipment.

Why was the left over bond money used for making bond payments last year and not used for completing the project – For starters, you were correct, Debbie. Those additional items that Buddy brought up (paving the roadway and parking lot, the sander rack, etc...) were removed from the project and would be discussed once the project was completed. If funds were available after the building was completed, the Board would decide whether to bring those items back into the project or not. Also, the State Comptroller's Office stated that the remaining bond money could only be used for the project, to include making bond payments, which they highly recommended in order to reduce the amount of money used each year from our fund balance.

Line item A1620.41 from the 2012 budget, showed a balance of \$99K up until November, then it reduced to \$0. Where did the money go? It was suppose to be used to make bond payments. That \$99K actually left that line item in February. Last February, there was a budget amendment to reduce line item A1620.41 to \$0 and move those funds into 2 new line items; A9710.6 (payments made toward the bond principle) and A9710.7 (payments made toward the bond interest (as recommended by the State Comptroller's Office). The sum of those two line items continued the same throughout the entire year - \$99K. The money did not disappear; it just rolled over into the Town's fund balance. Meanwhile, as Buddy indicated, we used the unused bond money from the H-Fund to make bond payments. There's approximately \$45K remaining in the H-Fund, and I would highly recommend the Town Board to use those funds to make the next bond payment in April, which will use up all of those funds. If we don't use those funds for the next bond payment, the tax rate will need to be increased significantly higher for the next few years to compensate.

The sale of some equipment in July did not go into A5130.2, like it was suppose to. The money for that equipment went directly into the revenue line DA2665 (Sale of Equipment). The Board did agree to put that money into the DA5130 line upon receiving it, however it would have required a budget amendment. I would have proposed a budget amendment if the funds were needed. As it turned out, those additional funds were not needed to close out 2012. Not to worry though; those funds have not disappeared. That \$5,485 is in the Highway Fund savings account. It cannot be used for anything outside of the Highway Fund.

Councilperson Teeter wrote an email to the entire board on April 11, 2013 with her recollection of events:

From: Deborah L. Teeter <dlt22@cornell.edu>
To: "daylilyann10@yahoo.com" <daylilyann10@yahoo.com>; Mike Carpenter <michaelfcarpenter@gmail.com>; Chris Hern <chern@hughes.net>; Vera Straight <vstrait18@htva.net>
Cc: Roy L. Barriere <rlb15@cornell.edu>
Sent: Thursday, April 11, 2013 11:27 AM
Subject: RE: Special Board Meeting

Good morning –

I understand there was confusion last night about the Bond Payment due. I know there are projects that were included in the original highway building project that have not been done, but the bond money cannot be used for these.

Roy – please correct anything below I have wrong):

This was the process: the highway building design project included all the bells and whistles that could be thought off. In the end, we had a project we suspected we could not afford. We looked at the project and based on recommendations from the Highway Superintendent (Buddy) made some decisions, the biggest ones I remember are:

The facility included plenty of space for cold storage; in the future, when the town grows to the point where we fill the building, additional space for cold storage can be considered

The highway crew could build salt storage for a lot less money

The highway crew could do a lot of the road work, and paving shouldn't occur right away anyway [note: at the time, we anticipated a new town hall going up in the near future; that does not appear to be the case now, and I don't think I could support paving a road to the highway department, which is used almost exclusively by heavy equipment, with a budget as tight as ours]

The next step was putting out the project for bid: we asked for multiple scenario figures (with and without certain parts of the project). After reviewing the bids, we figured out what we could afford and selected the contractors. **The parts of the project we eliminated due to costs and recommendations were NOT part of the final project, the contractor agreements, the referendum, or the bond.**

So, in a nutshell: **we cannot use remaining bond money to pay for projects that we did not bond for.** A bond is not a line of credit, where you only use what you need – it's like a loan, you get all the money up front. This is not a regular loan, though - if you borrow money to put an addition on your house and wind up with enough left over to also update a bathroom, good for you.

Why do we have so much money left over? Beats me. The project came in under budget. Good for us.

On April 12, 2013 Supervisor Rider forwarded an email from town attorney Guy Krogh to board members which stated the town should make the bond payment and supporting the belief that the bond money had been handled correctly:

From: Guy Krogh <gkrogh@thalerandthaler.com>
To: 'Ann Rider' <daylilyann10@yahoo.com>
Sent: Thursday, April 11, 2013 4:32 PM
Subject: Question re Bond Fund H for 2010 Highway Building Project

Hi Ann:

You presented a question regarding the legality, permissibility, and wisdom of utilizing Bond Fund H balances (as may have been moved to new and/or separate principal and interest budget lines) for the payment of bond debt service. By this answer I am not intending to answer the questions that could arise as to the wisdom of using other funds to complete improvements to the highway facility that were once considered or envisioned, and this answer constitutes my opinion on the question, though you may feel free to consult with the State Comptroller's Office or the Town's bond counsel should you want a second opinion or any clarifications as pertain to the nuances of bond rules or this opinion.

The answer to this question resides in three places: (i) the Bond Resolution, and supporting bond documents (such as the Arbitrage Certificate, Closing Certificate, etc.), which spell out the requirements for the bond and the authority of the Town relative to the bond and the project; (ii) the Local Finance Law of the State of New York; and (iii) the Internal Revenue Code, and related Treasury Regulations, affecting several important aspects of the bond itself, such as it remaining a tax-exempt obligation, arbitrage rules, use of excess funds and reinvestment rules, and the pledge by the Town of its full faith and credit to guarantee timely payments of principal and interest when due.

A failure to make bond payments when due can have very expensive and harsh consequences, such as a downgraded bond rating, a future inability to sell bonds, requiring that the whole amount or an "advance refund" may become immediately due (bond refunds, and their exceptions, are very complex treasury and securities regulations – don't go there!), or the loss of the bond's tax exempt status, etc. In short – come "you know where" or high water, the bond payments must be made.

So, without re-writing a book on the subject, the actual correct thing to do is to utilize bond funds to pay the principal and interest on the bond. By law, and as required in the Bond documents, the Town may only utilize bond proceeds in connection with the then approved project. Any alternative bid options that were not then pursued are no longer a part of that prior capital and lending process. Even if they were, bids that are now three years old are no longer valid and would not be honored by the contractors making such bids. As well, General Municipal Law § 103 would require a new competitive bidding process anyway, and as contractor costs have gone up, building codes have changed, and the prevailing wage rates have changed as well, the Town would have to do this anyway.

Hence, it is my opinion that any project once envisioned as part of those original bid specifications that were not in fact built would be new capital improvement projects and thus could not legally utilize any existing bond fund proceeds or surplus bond funds. To support this conclusion I supply the following additional information.

First, the Bond Resolution states: "Section 9. The Town hereby covenants and agrees with the holders from time to time of the Bonds and any bond anticipation notes issued in anticipation of the sale of the Bonds, that the Town will faithfully observe and comply with all provisions of the Internal Revenue Code of 1986, as amended (the "Code"), and any proposed or final regulations issued pursuant thereto, including, without limitation the Post Issuance Compliance requirements promulgated by the United States Department of Treasury unless, in the opinion of bond counsel, such compliance is not required by the Code and regulations to maintain the exclusion from gross income of interest on said obligations for federal income tax purposes."

Thus, by this the Town has already promised, and is already bound, to only use proceeds of the bond, and excess or surplus unexpended proceeds, in accord with the Internal Revenue Code. Expending such funds

on anything other than the then approved project is expressly prohibited under federal law and treasury regulations (with very, very few exceptions, none of which would seem to apply here).

Secondly, even if the Town could fall within some limited exception, New York State law would still prohibit the use of the funds for anything other than the bond debt service at this time. The Local Finance Law § 165.00 has express prohibitions concerning the use of surplus bond funds. In short, they may be used only to pay principal and interest on the bond itself, and any diversion of such funds to any other purpose, even if related to the underlying purpose of the bond, is prohibited (unless a special act of the NYS Legislature is enacted to permit the same). See e.g., Op. State Comptroller 67-661; Op. St. Compt. 88-7; Op. St. Compt. 95-13; Op. St. Compt. 79-404; Op. St. Compt. 78-442. While there are hundreds of other opinions on point, unexpended bond proceeds must be used only for payment of debt service upon the subject bond itself. This has long been the rule in NYS, and this rule is both compelled by and consistent with Federal Treasury Regulations concerning tax exempt municipal bonds. See e.g., IRC § 148; IRS Publication 4079, entitled "*Tax-Exempt Governmental Bonds*."

Thus, where the project has been closed by either the substantial completion of the project for which the bond funds were authorized and used, or when closed by the passage of time (usually 6 months to 2 years in the bond world) (if you want to know the exact pay-down date required by this bond, you should check the bond documents - most likely the closing or arbitrage certificates), any surplus bond funds may only be expended to pay the debt service (principal and interest) on the bonds themselves as required by Local Finance Law § 165.00. This is the situation I believe Enfield is in given substantial project completion sometime, to the best of my knowledge, in 2011.

As an aside, I am aware that the former Town Supervisor knew of these requirements as he frequently spoke with the State Comptroller to ensure the Town followed the rules and, on occasion, he would contact me to re-verify what he was told if he had doubts, could not remember, or if the advice seemed unclear.

Again, whether once considered bid alternatives should now or soon be undertaken as new or separate projects is a completely separate question for the Town Board to consider; as is the question of creating and/or funding a capital or other reserve fund for such improvements (whether a "specific" or "type" fund). It would seem to me that these might be worthy topics of consideration. Not worthy of even considering is not making a bond payment or not expending the entirety of the bond funds in a prompt and legal manner – on the bond debt service - as required by law.

Supervisor Rider requested the record reflect that she believes that Roy Barriere, former supervisor, did nothing about this bonding process or budget process without advice and counsel from the State Comptroller's Office and on their recommendation he made changes in the budget last year in line items. The State Comptroller is the final say in New York State regarding the correct handling of municipal finances.

Supervisor Rider would like to continue to have a dialog about wishes that the highway superintendent has about other things at the highway site and she has emailed Chuck Fezali of Resource Associates and he has not responded. Paperwork has not been done, however that does not negate the fact that anyone looking at this situation would feel that the project is substantially completed.

Councilperson Hern doesn't feel that anyone has ever stated that the money was spent in any illegal way. He feels it would have been better spent on part of the project that didn't get done since that's what the money was borrowed for. He believes the bond payment should be made on time, but had felt the money should not come from the H-Fund. However, after reading Guy's response, he feels it should

be paid from the H-Fund and then it will be gone and taken care of. But there will still be money left in the other two budget lines, that were for principal and interest on the bond, at the end of the year. So the \$43,955 should still be remaining after the second bond payment is made. He would like to see that amount committed to projects at the highway department instead of being rolled to unallocated funds at the end of the year.

Supervisor Rider stated she will continue to try to get the facts and figures in a central space and then check with the powers that be, our attorney and the State Comptroller's Office, on how the money can be spent.

Councilperson Teeter asked if the money was wired on Monday, April 15, if it would be posted in time.

Supervisor Rider has authorized Mary Cornell, bookkeeper, to begin the preliminary work that needs to happen in order for the transfer to happen on April 15, 2013. Mary Cornell has assured Supervisor Rider that the money will be in the proper hands by April 15.

Councilperson Teeter feels that if projects weren't included in the original amount, then the money couldn't even be used to buy materials for the highway department to do the work.

Supervisor Rider feels that since this was a very complicated project, lack of communication may have caused problems. In order to complete the wished projects, money has to be put up, even though the labor is free. She was told that the old cold storage building could be dismantled and the materials used for building cold storage at the new site.

Vote: Councilperson Carpenter aye, Councilperson Hern aye, Councilperson Howe-Strait aye, Councilperson Teeter aye, Supervisor Rider aye. Carried

Supervisor Rider moved, with a second by Councilperson Teeter, to adjourn the meeting at 6:50 p.m. Carried.

Respectfully submitted,

Alice Linton, Enfield Town Clerk